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Mexico—Are the Rules Really Changing?†

Introduction

On October 12th, 1972 United States Ambassador to Mexico, Robert H. McBride addressed a meeting of the Mexican-American Businessmen's Committee in Acapulco.[1] It was a luncheon session of this group which traditionally meets once a year in pleasant surroundings in the United States or Mexico, to discuss problems of mutual interest. 1972 was Mexico's year to host the meeting and as usual wives were invited. The Ambassador spoke for 15 to 20 minutes after the luncheon in one of the large dining rooms of the Princess Hotel, in an atmosphere hardly designed to produce major foreign policy statements.

His subjects in chronological order were trade, tourism and investment. In respect to trade he noted the high volume of Mexican sales to the United States and explained the motivation for the existing and contemplated American protectionist legislation that might harm Mexican interests.

He acknowledged a diminishing trade deficit on the Mexican side, but pointed to tourism as a factor which in fact reversed the deficit, leaving Mexico with an overall bilateral surplus. He expressed concern over the Mexican customs laws which do not define what Mexican tourists returning from the United States may bring back free of duty.

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[1]A Spanish translation of the speech was published in the Mexico City daily *Excelsior* on October 13, 1972. The United States Information Service in Mexico City distributed copies of the original in English.

"Finally" said Ambassador McBride, "I also want to devote some attention to the question of investment with particular reference to foreign investment since I am aware that a considerable portion of your agenda will be taken up by this subject." In his "brief comments" on the subject the Ambassador mentioned the absence of restrictions on the part of the United States on investments by American companies in less developed countries, American recognition of the right of the receiving country to determine the extent and condition of foreign investment and the importance and desirability of foreign investment in Mexico.

Halfway through the last paragraph, three sentences from the end of his speech Ambassador McBride observed: "Let me state quite frankly that I note an attitude, not of alarm but of definite concern, as to whether the *rules of the game* might be changed, not only for new investment but also for established firms" (emphasis added). He concluded with the hope that his audience might assist in clarifying the point.

It was a speech only marginally more critical than the usual ambassadorial effort to pour oil on mildly troubled relations. It is hardly to be believed that Ambassador McBride intended that any part of the speech should arouse his sunburned audience, much less his final brief comment on the "Rules of the Game" as he put it. But within 24 hours he found himself, by virtue of that comment, the keynote speaker in one of the great debates of our day.

On October 13th every major daily newspaper in Mexico City headlined, not the speech, but the comment about the Rules of the Game. Forthwith the President of the College of Economists, the Director of the Mexican Institute of Foreign Commerce, and President of the Council of the Americas, and the Presidents of Du Pont, Sears Roebuck and Anderson-Clayton of Mexico all felt compelled to comment publicly on the Rules of the Game observation.

On October 14, the Under Secretary of Industry and Commerce, Lic. José Campillo Saínz, in personal representation of President Luis Echeverría, addressed the same American Mexican Businessmen's Committee now re-united in the more chilling climate of Mexico City at a breakfast meeting at which the President was the scheduled speaker. In sharp reply to Ambassador McBride's query, Lic. Campillo retorted: "Sí señores, estamos cambiando las reglas del juego!" which under the circumstances must be translated: "You bet your life we're changing the rules of the game!"[2]

The public debate ignited by this exchange has persisted to the date of this article. In the week following Ambassador McBride's speech, it gave

[2]Published in *Excelsior*, October 15, 1972.

rise to 23 front page articles in a single major Mexico City daily newspaper, not to mention the editorials, magazine articles and unpublished speeches.[3] Even considering the lingering suspicion that press comment in Mexico is not entirely spontaneous, that reaction must be considered extraordinary.

The Rules-of-the-Game speech brought dramatically into the open, the "concern" which the Ambassador had correctly observed, and provided the Mexican Government, Mexican politicians and Mexican press with an opportunity to debate the role of foreign investment, and to express strong sentiments about the forthcoming legislation on that subject and on transfers of technology.

In the month that followed, a series of national and international events added fuel to the controversy. A new statute limiting foreign ownership in the auto parts industry was signed into law on October 23rd.[4] Debate on the then pending law governing transfers of technology, which to that time had been rather subdued, became increasingly more strident.

President Echeverría formally announced his intention to regulate foreign investment directly across the board for the first time in Mexican history.[5] Heavy criticism was directed to foreign ownership in particular sectors, among them the food processing industry—and shortly thereafter H.J. Heinz announced it was liquidating its investments in Mexico.

The visit to Mexico and subsequently to the United Nations of Chile's President Salvador Allende, in early December, and the enthusiastic support given him by President Echeverría and Mexican politicians following his lead, magnified the issues and brought to the Mexican scene comparisons to the course of events in Chile. Mexico's support of Chile in its dispute with Kennecott which resulted in the attempted embargo of the Chilean copper shipment then in Europe, had the same effect. During the same period the Government announced measures to intervene more directly in the tobacco industry and the telephone company.[6]

Outside Mexico, the Council of the Americas announced an initiative to defend the interests of private enterprise in Latin America. Senator Frank Church's committee began its denunciations of United States enterprises operating abroad. A delayed release of Supreme Court Justice Lewis F. Powell's July 1972 memorandum to the American Chamber of Commerce suggesting a plan for the defense of the free enterprise system within the

[3]The reference is to *Excelsior*.

[4]Presidential Decree published in the *Diario Oficial*, October 24, 1972.

[5]The announcement was made on November 29, 1972, and published in Mexico City dailies on November 30.

[6]The announcement on the acquisition of telephone shares was made in August, 1972; that on the tobacco industry in early November.

United States was reported as a new attack upon "communist, socialists, and revolutionaries, in defense of multinational enterprises."[7]

All of the above plus reverberating comment from other American political figures such as Senator Mansfield, Governor Rockefeller and Under Secretary of State Charles Meyer received front page coverage in the Mexican press, so that by year end the concern that Ambassador McBride identified had unquestionably become the alarm he did not wish to suggest.

As a climax to all of the above, speculation about the usual year-end legislation in Mexico, produced rumors of more drastic changes. Suggested were inheritance taxes, taxes on foreign travel by Mexican residents, the complete abolition of bearer shares, steeply increased personal and corporate tax burdens and other equally non-traditional Mexican measures. Trading on the Mexico City Stock Exchange, normally very light, fell off one third during December, and there were strong rumors of a flight of capital.

As this article is written in mid-March, the near panic which had characterized business reaction in December and early January has totally subsided. To all appearances the Mexican Government has put a damper on the public debate of the foreign investment question, and most public comment by business is cautiously favorable to enthusiastic. The same law that was proclaimed with such fanfare in November was approved by the legislature in February in closed session without press releases or coverage. Even if one concedes that publicity and the course of events have magnified and distorted the overall picture, and even though they may no longer feel it politic to voice their concern publicly, many businessmen and government officials continue to ask themselves whether the rules have changed or are changing.

Under these circumstances, it is timely to pause and examine the history of Mexico's attitude toward foreign investment, and the *real* changes effected by the recent laws. It would be too much to say that this analysis alone will answer Ambassador McBride's question. But for those who wish to be guided by the laws as they are, rather than by the publicity, it will provide a firm historical and factual basis for some definite conclusions about Mexico's future attitude towards foreign investment.

History of Foreign Investment Regulation

The regulation of foreign investment in Mexico is neither recent nor unusual. Historically there have been regulations by which foreign in-

[7]The Powell memo was headlined in *Excelsior* of December 12, 1972, Senator Church's activities on December 13; and the Council of the Americas' action on December 11.

vestment in certain fields of activity, and as regards specified properties has been either limited, conditioned or even prohibited.

For the purposes of this article a complete historical study of the very early legislation is unnecessary. The Mexican Constitution of 1917 provides the best point of departure, since it substantially constitutes the basis on which the Mexican legal system is founded.

Article 27 of the 1917 Constitution

The 1917 Constitution contains various important regulations regarding foreigners, defining the status of foreigners, their basic rights and the jurisdiction of the Federal Congress to legislate on such matters.[8] The most important provision in this area is Article 27, which certain authors have called the norm basic to the entire Constitution.

Section I of Constitutional Article 27 gives exclusively to Mexicans and Mexican companies the right to acquire ownership of lands, waters and their appurtenances or to obtain concessions for exploitation of mines or waters. However, the Mexican Government, according to this Article, may grant these rights to foreigners provided they covenant with the Ministry of Foreign Relations to consider themselves Mexicans, with respect to such properties and not to seek the protection of their Governments under penalty of forfeiting such interests or participation to the Mexican nation.

The doctrine on which this requirement was based, often referred to as the "Calvo Clause," was first enunciated by the Argentine Carlos Calvo. The cited article in addition, provides that no foreigner may acquire direct ownership of lands and waters within 100 kilometers of the borders, or 50 kilometers of the coasts. These areas are in practice referred to as "prohibited zones."

An Organic Law of Section I of Constitutional Article 27, as well as a Regulation of said Law, were enacted in 1926.[9] In both, the "Calvo Clause" is regulated in greater detail. The Organic Law established the precept that for a foreigner to form part of a Mexican company which holds or may acquire ownership of lands, waters and their appurtenances or concessions for exploitation of mines, waters and mineral fuels in the Mexican Republic, a covenant according to the terms of the Calvo Clause must be made with the Ministry of Foreign Relations as a condition to an authorizing permit being granted.[10]

The Regulation further provides that an authorization, also conditioned

[8]Arts. 32, 33 and 73 of the Mexican Constitution of 1917.

[9]Art. 1; Organic Law of Section I of Constitutional Article 27 of December 31, 1925; *Diario Oficial* of January 21, 1926. Art. 1; Regulation of the Organic Law of Section I of Constitutional Article 27, *Diario Oficial*, March 29, 1936, as amended.

[10]Art. 2; Organic Law of Section I of Constitutional Article 27.

upon a "Calvo" covenant, must be obtained from the Ministry of Foreign Relations, to constitute a Mexican association or corporation which wishes to be in a position to admit foreign partners or stockholders, and to acquire direct ownership of lands, waters and their appurtenances outside of the prohibited zones, or to acquire concessions for exploitation of mines, waters and fuels in the Mexican Republic.

The Regulation goes on to provide that notaries and other officials involved shall insure that said authorization and covenant be contained in all deeds of incorporation (corporate charters) of such Mexican associations or corporations, under penalty of loss of employment, and that such authorization and consequent covenant shall be required upon each and every acquisition of the cited properties or concessions.[11]

Section IV of Constitutional Article 27 provides that commercial stock companies (corporations) may not acquire, hold or manage rural properties. Such companies organized or engaged in fields other than agriculture may, however, acquire, hold or manage lands in an area strictly necessary for their purposes, which area shall be established by the Federal or State executive branch. The Organic Law stipulates that as regards other Mexican companies (other than commercial stock companies, as pointed out) which possess rural property for agricultural purposes, the permit for participation by foreigners will be denied if by reason of such participation 50 percent or more of the total interest in the Company will be in the hands of foreigners.[12]

The Organic Law also provided that foreign individuals holding 50 percent or more of companies which possess rural property for agricultural purposes, could retain such interest for life and foreign companies in the same position, for a period of ten years.[13] Foreigners holding other rights defined and regulated by the Law, were allowed to retain the same for life.[14]

The Regulation stipulated sanctions for notaries to require their compliance[15] and Corporations were required to transcribe the said Calvo Clause textually on all stock certificates.[16] Mexican associations or companies in existence prior to the Regulation, which owned lands, waters or their appurtenances or concession for exploitation of mines, waters or mineral fuels within the Mexican Republic, were required to insert the

[11]Art. 2; Regulation of the Organic Law of Section I of Constitutional Article 27.

[12]Art. 3, of the Organic Law of Section I of Constitutional Article 27.

[13]*Id.*, Arts. 4, 5, and 6.

[14]*Id.*

[15]Art. 3; Regulation of the Organic Law of Section I of Constitutional Article 27 as amended.

[16]*Id.*, Art. 4.

Calvo Clause in their corporate charters, in order to be in a position to transfer shares to foreigners,[17] as were companies in existence which might wish to have foreign partners or stockholders.[18]

Such companies further were required, if they issued new stock certificates for any reason, to indicate such a clause thereon.[19] Finally, the Regulation provided that authorization would be required from the Ministry of Foreign Relations for Mexican associations or companies to acquire such property in the prohibited zones, and that, as a condition thereto a covenant was required that no foreign person, either individual or corporate, could have an interest or own shares of such a company.[20]

Such covenant is commonly called a "foreigner's exclusion clause," which must be included today in the corporate charter of companies which wish to hold land in the prohibited zones. Acquisitions in such companies in violation of this rule are null and void.

The requirement for a permit conditioned upon acceptance of the terms of the Calvo Clause initially, then, was limited to those companies which, although permitted to have foreign partners or stockholders, wished to be able to acquire direct ownership of lands, waters or the indicated concessions. This requirement was subsequently extended in practice to include constitution or modification of any type of company. This has been the case especially since publication of a wartime Presidential Decree of 1944, which made the Foreign Office permit mandatory in all such cases, as well as in each case of acquisition of real property or of shares representing control of other companies.

Presidential Decree of 1944

This Decree was issued by the President of Mexico, in the use of special powers granted him under a state of emergency during the Second World War.[21] For years it constituted the basis of control of foreign investment in Mexico. Lacking a body of laws to legislate in this area, the Decree was employed to determine all cases in which non-Mexican capitalists initiated any new venture in Mexico.

The purpose of the Decree as expressed in the preface thereto was much more specific. The same was designed to provide rules of a general emergency nature for control of the great influx of foreign capital coming into Mexico as a result of the War, which capital it was feared might cause

[17] *Id.*, Art. 5.
[18] *Id.*, Art. 6.
[19] *Id.*, Art. 5.
[20] *Id.*, Art. 8.
[21] *Diario Oficial*, July 7, 1944.

future problems if allowed to acquire properties and business freely, at the expense of Mexican participation.

The Decree established that during such time as the suspension of guarantees decreed on June 1, 1944, as a consequence of the state of emergency occasioned by the war, continued in force, foreigners or Mexican companies which might have foreign partners or shareholders would require prior authorization from the Ministry of Foreign Relations, in the following instances:

a. to acquire most described existing companies or businesses in the Republic of Mexico or control of the same;
b. to acquire real property destined to activities engaged in by the said companies;
c. to acquire any kind of urban or rural real estate;
d. to acquire ownership of lands, waters and their appurtenances as reference in Section I of Constitutional Article 27;
e. to obtain concessions for mines, waters or mineral fuels allowed by ordinary legislation.[22]

Leases for more than ten years' duration, and trust agreements in which the beneficiary is a foreigner, or Mexican companies authorized to have foreign partners or stockholders, were held to constitute acquisitions under the terms of the Decree. The Organic Law cited above had provided that leases of more than ten years' duration were not to be considered as transfers of property.[23]

The Decree made authorization from the Ministry of Foreign Relations mandatory in the following cases:

a. To organize Mexican companies which have or which might have foreign partners or stockholders;
b. To change or modify existing Mexican companies, or those established in the future, especially if by such measure:
   (i) Mexican partners or stockholders would be replaced by foreigners; and
   (ii) The corporate purposes would be changed in any way.
c. To purchase or sell shares or interests by which control of a company was to pass to foreign partners or stockholders.[24]

This Decree granted discretionary power to the Ministry of Foreign Relations to deny, grant or condition authorizations. Importantly, the said Ministry was empowered to require at least 51 percent Mexican control of

[22]*Id.*, Art. 1.
[23]Art. 10; Organic Law.
[24]Art. 2; Presidential Decree of 1944.

Mexican companies and to require that a majority of the Directors thereof be of Mexican nationality.[25]

On October 1, 1945 the Mexican Government published a decree in the *Diario Oficial,* cancelling the state of emergency and the suspension of guarantees decreed earlier. Article 5 of the decree ratified and extended the effectiveness of all governmental rulings issued during the suspension of guarantees, with the exception of those rulings issued with validity limited and conditioned to the state of emergency. Article 6 ratified and declared that all laws, decrees and regulations issued during the state of emergency and related to the intervention of the Government in the economy of the country would continue in force. On October 14, 1944 the Ministry of Foreign Relations issued a circular which stated that authorization would be required to constitute or modify a company, as well as for a company to acquire real estate.

The legal validity of both the referenced Decree of 1944, and the Circular have been debated in and out of court. The Mexican Bar Association has contended that the Decree was an emergency decree, and that its legal effect ceased upon termination of the suspension of rights at the end of the Second World War.[26] The Mexican Supreme Court has held likewise,[27] but only in two opinions which do not constitute binding jurisprudence but only precedent under Mexican law.

In spite of the dubious legal effect of the Decree of 1944, for years the same has continued to be relied upon, as a basis for requiring authorizations from the Ministry of Foreign Relations to establish new companies, to modify existing companies, to increase capital stock in the same and to acquire shares in companies as indicated.

Specifically Reserved Areas of Activity

In addition to the cited legal norms, other laws and administrative rules regulated foreign investment in Mexico in specific areas.

Perhaps the most familiar and most commented upon field of activity specifically reserved for Mexican public ownership, is the *petroleum industry.* The basic laws which regulate this area existed even before the celebrated expropriation of the industry in 1938, the repercussions of

[25]*Id.,* Art. 3.

[26]Opinion of the Mexican Bar Association published in the magazine *El Foro,* IV Epoch, January through June 1956.

[27]Resolution of the Mexican Supreme Court of September 20, 1962, Amparo 507/62, Química Industrial de Monterrey, S.A. Resolution of the Mexican Supreme Court of September 9, 1964; Amparo No. 1612/64, Playtex de México, S. A.

which were felt throughout Latin America. Constitutional Article 27 in regard to this area has been amended several times.[28]

The new text of this Article provides that direct ownership of, and the right to, exploit petroleum and all solid liquid or gaseous hydrocarbons lies exclusively with the Nation. The Regulation of the Regulatory Law of Constitutional Article 27 in the Field of Petroleum confirms that only the Nation, through the decentralized public institution Petroleos Mexicanos, may carry out the exploration and exploitation work required to utilize petroleum and to develop deposits or undertake petroleum refining.[29]

The *petro-chemical industry* was first regulated under the cited Regulation of the Regulatory Law of Constitutional Article 27 in the Field of Petroleum.[30] On February 9, 1971 a new regulation was issued addressed exclusively to the Petro-Chemical Industry.[31] Under the terms of both cited Regulations, the basic petro-chemical industry is reserved exclusively to the Nation. The Regulation does provide, however, that the elaboration of chemical products resulting from processes subsequent to those which constitute basic petro-chemicals, may be carried out by Mexican companies having foreign capital, as long as Mexican capital participation therein represents at least 60 percent of the total capital structure of the company.[32]

The other activities reserved to the State are the *electrical industry,* by virtue of Constitutional Article 27, which prohibits the granting of concessions to private persons, the field of *communications* including telegraph and radio-telegraph public services and public mail service, as well as *railroad transportation.*[33]

Other fields were reserved by law to Mexican nationals or Mexican companies containing the foreigner's exclusion clause, *i.e.,* companies in which no foreign participation is allowed. Such fields include *radio and television,*[34] *land transportation* on Federal routes,[35] *distribution of LP gas* and *exploitation of forests.*[36]

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[28]Constitutional Art. 27 as amended by Decree of December 27, 1939, *Diario Oficial* December 9, 1940; especially paragraph 6° of Article 27 as amended by Decree of January 6, 1960, *Diario Oficial* January 20, 1960; by Decree of December 23, 1960, *Diario Oficial* December 29, 1960.

[29]Art. 23, Regulation of the Regulatory Law of Constitutional Article 27 in the Field of Petroleum, *Diario Oficial,* August 25, 1959.

[30]*Id.,* Arts. 26–30.

[31]Regulation of Constitutional Art. 27 in the Field of Petroleum, in the area of Petro-Chemicals, *Diario Oficial,* February 9, 1971.

[32]*Id.,* Art. 4 and Art. 15, para. III.

[33]Arts. 11, 129, para. I, Law of General Means of Transportation and Communications, *Diario Oficial,* February 19, 1940.

[34]Arts. 2, 14 and 25, Federal Radio and Television Law.

[35]Art. 152, para. I, *supra* note 33.

[36]Article 87 of the Forestry Law.

There are in addition several areas of activity in which, although foreign capital is permitted to participate, limitations are imposed thereon. The limitations are derived from laws, Presidential Decrees, various administrative decisions and also from rules issued by the Inter-Secretarial Commission on Control of Foreign Investment, established in 1947.

Constitutional Article 27 provides that the nation shall have direct ownership of all *minerals,* requiring that these be exploited only by means of concessions granted by the Government in accordance with applicable laws. A series of rules and regulations[37] has been established to control foreign investment in *mining.*

Companies engaged in mining exploitation in so-called "national reserves" must have at least 66 percent Mexican capital participation. Foreign capital participation in such companies is limited thus to a maximum of 34 percent. Mining companies engaged in exploitation of other than "national reserves" must have at least 51 percent Mexican capital participation. A majority of the members of the Board of Directors must be of Mexican nationality in both cases.

When the cited rules and regulations were enacted there were in existence and operating, many mining companies comprised totally of foreign capital or in which foreign capital was in a majority position. Such companies were permitted to continue in operation in order not to apply the said laws retroactively, but it was held that no new mining concessions would be granted to any non-Mexicanized company. Furthermore, it was held that only companies with a majority of Mexican capital were entitled to existing mining tax benefits. The result has been that at present almost the entire Mexican mining industry is Mexicanized.

Earlier laws regulating the operations of *credit, insurance* and *financial institutions* were modified by Decree of December 30, 1965 for the purpose of prohibiting participation in the capital of same, by either foreign governments or official dependencies of the same or by groups of foreign persons, either individuals or companies. The idea behind such modifications it would seem was to prevent banks, financial institutions, insurance and finance companies from falling under the control of non-Mexican corporations or financial groups.

The cited prohibition does not include non-Mexican individuals who legally may hold shares in these types of businesses. Nevertheless, in order for such individuals to be able to hold shares representing 25 percent or more of such companies, a special authorization is required. A change in

[37]The Mining Law; Regulation of Constitutional Article 27 in the Area of Exploitation and Use of Mineral Resources in force on April 20, 1960, as amended on January 4, 1966. Regulation of the Mining Law, in force since January 1967.

the Mexican Income Tax Law published in the *Diario Oficial* on December 29th, 1971 required foreign lending institutions to register as foreign financial institutions with the Ministry of Finance, in order to qualify for the 10 percent Income Tax withholding rate on interest earned. Failure to register or to obtain registration which is discretionary with the Ministry of Finance, will result in the application of ordinary income tax rates escalating to 42 percent.[38]

A decree published July 2, 1970 provided that a minimum of 51 percent Mexican capital would be required to form companies whose corporate purposes were the development of the *steel, cement, glass, fertilizers, cellulose* or *aluminum* industries. The decree added a further limitation that if the by-laws provided special majorities for certain shareholder action, then the required percentage of Mexican ownership would increase to the percentage necessary for shareholder action.[39]

Land ownership in the prohibited zones was the subject of a Presidential Decree in April 1971, designed to legitimize and eventually to control existing and future holdings of foreigners in these zones. It empowered the Minister of Foreign Relations to supervise and administer the creation of trusts with Mexican Fiduciary Institutions, to regularize illegal forms of ownership then in existence, and to control future acquisitions by foreigners. The trusts have a maximum duration of 30 years, and permit the free transfer of beneficial interests during that period.[40]

Some *other activities* which require a minimum of 51 percent Mexican capital are cinematography, including the preparation of video tapes for television; international maritime transportation, provided Mexican capital is available; and coastal shipping services; urban and interurban transportation; pisciculture and fishing; production, sale and distribution of carbonated waters, as well as essences, concentrates and syrups used in the preparation thereof; editing and publishing of books and magazines; publicity and advertising; manufacture of fertilizers and insecticides; the rubber industry; maritime products packing plants; preservation and packing of foodstuffs; basic chemicals.[41]

The most recent specific industry to be reserved to Mexican ownership was the *automobile parts industry*. The Presidential Decree published October 24th, 1972 required that the manufacturers of automobile parts be at least 60 percent Mexican owned. The same decree established escalating

[38]*Diario Oficial* December 29, 1971; Rules for the operation of representation offices were published on April 11, 1972.

[39]*Diario Oficial*, July 2, 1970.

[40]*Diario Oficial*, April 30, 1971.

[41]These represent administrative decisions, and for the most part are not published.

export levels for the existing terminal automobile assemblers, most of whom are 100 percent foreign owned.[42]

New Laws on Foreign Investment and Technology

New Mexican Law on Transfer of Technology

Mexico's "Law on the Registration of the Transfer of Technology and the Use and Exploitation of Patents and Trademarks" published December 30th 1972 went into effect by its terms on January 29th, 1973.[43] It creates a National Registry of Technology Transfers within the Department ("Secretaría") of Industry and Commerce granting consulting powers to the National Council of Science and Technology.[44]

Required to be registered are documents containing agreements producing effects within Mexico, involving transfer or authorization of use trademarks or patents, the supply of technical information by means of designs, diagrams, models, manuals, directions, procedures, specifications, personnel training and other means, as well as the provision of basic or detailed engineering for construction or for the manufacture of products, and any technical assistance or administrative service of any nature.[45]

The Mexican party to such arrangement is required to register; the foreign party may do so, registration being required within sixty days of execution in order that the agreement take effect as of the date of execution.[46] Documents not registered have no legal effect until registered, and programs involving the agreements not registered, and the parties thereto, may not receive the benefit of incentives provided in the Law to encourage new and necessary industries and other laws, and may not have production programs approved.[47] Contracts entered into before the effective date of the law must be filed before June 11, 1973, and must conform to the criteria established in the law before January 29th, 1975.[48]

The Secretary of Industry and Commerce may deny registration based upon a series of criteria established in the law, but must act upon a request for registration within ninety days or the registration becomes automatic.[49] Decisions on requests for registration of existing agreements must be made

[42]*Diario Oficial,* October 24, 1972; Arts. 33, 11.
[43]*Diario Oficial,* December 30, 1972; First Transitory Disposition.
[44]*Id.,* Art. 1.
[45]*Id.,* Art. 2.
[46]*Id.,* Arts. 3, 4.
[47]*Id.,* Arts. 5, 6.
[48]*Id.,* Second Transitory Disposition; the June 11, 1973 date was fixed by the Registry Office interpreting the 90 days as working days.
[49]*Id.,* Arts. 7, 10.

within 120 days.[50] Failure to obtain registration for existing agreements within the two-year period will render them null and void, and deprive the contracting party of any benefits it may enjoy under governmental industrial or tax incentive programs.[51] Persons affected by decisions on registration may appeal for reconsideration, a decision on such appeal being required within 45 days or the appeal is considered accepted.[52]

The Secretary of Industry and Commerce is instructed to deny registration to contracts containing a series of clauses or agreements.[53] These may be divided into two groups, the first of which may not be waived under any circumstances. Included in this group are agreements for the transfer of technology available within Mexico, clauses granting free cross licenses, limitations on research or technical development by the licensee, limitations on exports, clauses invoking the jurisdiction of foreign courts or contracts of excessive duration, the maximum, established by law, being 10 years mandatory for the licensee.

Contracts containing another series of objectionable clauses may be registered only on an exceptional basis, when the technology to which they relate is judged of special interest for the country. Objectionable clauses in this category include those establishing excessive or disproportionate compensation for the technology, those granting the licensor intervention in the administration of the licensee, those requiring the use by the licensee of personnel designated by the licensor, and those limiting production volumes or controling resale prices.

In the same category are clauses requiring the purchase by the licensee from a predetermined source of equipment or raw material, those granting the licensor an exclusive right to purchase products of the licensee, and those requiring the licensee to grant exclusive selling or franchise rights to the licensor within Mexico. Also prohibited in this category are clauses restricting the use of other technology.

All contracts or legal acts producing effects within Mexico must be governed by Mexican law.[54] A provision of particular interest obliges government personnel involved in registration and review processes to maintain confidentiality with respect to the material under review, except in cases of information which under other laws or regulations is determined to be public domain.[55]

[50] *Id.*, Sixth Transitory Disposition; this provision has raised a question whether the Registry Office may not feel obliged to accept or reject existing agreements within 120 days; most attorneys believe these will be simply noted for the time being.

[51] *Id.*, Fourth and Fifth Transitory Dispositions.

[52] *Id.*, Art. 14.

[53] *Id.*, Arts. 7, 8.

[54] *Id.*, Art. 7.

[55] *Id.*, Art. 13.

New Mexican Foreign Investment Law

Mexico's "Law to Promote Mexican Investment and Regulate Foreign Investment," published in the *Diario Oficial* of March 9, 1973 creates for the first time in Mexico a registry of foreign investment, and a commission to regulate that investment.[56] The National Registry of Foreign Investments is established within the Department of Industry and Commerce under the supervision of the Executive Secretary of the Foreign Investment Commission.[57]

Required to be registered are foreign individuals and corporations with investments in Mexico, Mexican companies with any foreign ownership, trusts with foreign beneficiaries established under the new law, and securities representing capital owned by or pledged on behalf of foreigners and any transfers thereof.[58] The registrations required by the law are mandatory and automatic in the case of existing companies or individuals, and must be presented within 180 days from the effective date of the law.[59]

Affected companies which do not register may not pay dividends, and affected shareholders failing to register, may not receive them. Corporate registrations may be compelled through shareholder action.[60] In addition, registration violations may be sanctioned with fines up to $8,000.[61]

The National Commission on Foreign Investment is composed of the Secretaries of the Interior, Foreign Affairs, Finance and Public Credit, National Properties, Industry and Commerce, Labor and Social Welfare, and the Presidency. It meets at least once a month and is assisted by a Presidentially appointed executive Secretary.[62] It is empowered to fix the permissible percentages of foreign ownership not already fixed by law, and to determine exceptions required by special circumstances.

It is to pass upon proposed foreign investment in new or existing companies, and upon new activities by companies with foreign investment, and to provide consultation for other agencies of the Government in respect to foreign investment. It has the power to issue regulations and to coordinate activities of other governmental agencies, as well as to propose laws and regulations to the President.[63]

In its determinations it is guided by a series of seventeen criteria encompasing every phase of Mexico's domestic and foreign economic devel-

[56] *Diario Oficial*, March 9, 1973; The law enters into effect 60 days from the above date under the First Transitory Disposition.
[57] *Id.*, Arts. 23, 24.
[58] *Id.*, Art. 23.
[59] *Id.*, Third Transitory Disposition.
[60] *Id.*, Art. 27.
[61] *Id.*, Art. 29.
[62] *Id.*, Art. 11.
[63] *Id.*, Art. 12.

opment, the last of these being precisely the extent to which a project helps achieve the objectives of the policy of national development.[64] Chief among these are that it not displace Mexican investment, the balance of payment implications, national employment and the development of less developed zones, the technological contribution, and the effect upon the nation's social and cultural values.

Incorporated within the law are a series of already existing limitations on foreign ownership in addition to certain complementary provisions designed to aid in the administration and enforcement of the law.

Certain activities are reserved exclusively for the Government. These include petroleum and hydrocarbons, basic petro-chemicals, exploitation of radioactive material and nuclear energy, mining to the extent already reserved by law, electricity, railroads, telegraphic and wireless communications, and other activities specifically reserved by law.[65]

Other activities are reserved exclusively for Mexicans or 100 percent Mexican companies. These include radio and television, urban and inter-urban transportation, domestic air and maritime transportation, forestry, distribution of natural gas and others specifically reserved by law or regulations.[66]

Foreign ownership in a third series of activities is permitted up to specified percentages.[67] The limitations referenced in this law are 40 percent in the secondary petro-chemical industry and in the automotive components industry, and 49 percent in companies exploiting or using minerals, with a further limitation of 34 percent in companies with special concessions for the exploitation of national mining reserves.

The law contains the further usual provision abrogating laws and regulations in conflict with it, and specifically leaves all others in effect.[68]

In cases where percentages are not established by law, foreign investors may hold up to 49 percent of the capital of a company but may in no way control the management thereof. The National Commission on Foreign Investment is empowered, however, to increase or reduce the 49 percent limit when in its judgment this is desirable for the country's economy.[69] It may prescribe further conditions for the acceptance of foreign investment in specific cases, never permitting the foreign role in corporate administration to exceed its share capital.[70]

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[64] *Id.*, Art. 13.
[65] *Id.*, Art. 4.
[66] *Id.*, Art. 4.
[67] *Id.*, Art. 5.
[68] *Id.*, Art. 5; Fifth Transitory Disposition.
[69] *Id.*, Art. 5.
[70] *Id.*

Foreigners, foreign companies, and Mexican companies with any foreign ownership are prohibited from acquiring title to lands within 100 kilometers of the frontier or 50 kilometers of the shoreline. Foreign corporations may not acquire direct ownership (el dominio) in real estate, water or water exploitation rights; foreign individuals may acquire such interests in real estate only with permission.[71]

Also incorporated in the new law are sections from the April-1971 Presidential Decree, permitting foreigners to own indirect interests in real estate through legislatively recognized trusts with Mexican fiduciary institutions.[72] The maximum term is 30 years at the end of which time title must be transferred to persons legally able to acquire it. The law does not say whether such a person might not be a second trustee but the implication is that foreign interests are to expire at that time, and the regulatory power of the Commission appears adequate to bring this about.

Authorization is required from the Government Secretariat in whose field of activity a proposal falls, for the acquisition by foreigners of 49 percent of the assets or 25 percent of the stock of existing companies, or for any arrangements transferring management control to foreign hands.[73] In the administration of the above section, the commission may require a prospective seller to grant a right of first refusal to Mexican investors, such rights to extend for no more than 180 days.[74] The Commission is also empowered to adopt measures to promote the acquisition of existing businesses by Mexican interests.[75] A permit is required from the Foreign Office for any foreigner to establish or modify any company.[76]

A number of miscellaneous provisions indicate the clear intention of the Mexican Government to enforce the new law. Foreign ownership is defined to include that by Mexican companies majority-owned or controlled by foreigners.[77] All share ownership by foreigners must be in nominal form. Existing companies have 180 days from the effective date of the law in which to effect the change.[78]

The so called "inmigrado"; a person with more than five years permanent residence in Mexico may be considered a Mexican for purposes of

[71] *Id.*, Art. 7. In practice in the past foreigners who were not permanent residents were denied permits to acquire land anywhere, but were able to form Mexican corporations which could do so except in prohibited zones. These are not affected by the law but new acquisitions will have to be 51% Mexican beneficially or at least in trust.

[72] *Id.*, Arts. 18-22.

[73] *Id.*, Art. 8.

[74] *Id.*, Art. 9.

[75] *Id.*, Art. 10.

[76] *Id.*, Art. 17.

[77] *Id.*, Art. 2.

[78] *Id.*, Art. 25; Second Transitory Disposition.

the new law, but only if not connected with ("vinculado") foreign centers of economic decision.[79] Even in this case they will not qualify for activities reserved exclusively for Mexicans or otherwise subject to specific regulation. All foreign participation is subject to the execution by the foreign party of the so-called Calvo Clause, renouncing the right to invoke diplomatic protection under penalty of forfeiting all interests to the Mexican Government.[80]

Directors and administrators with responsibilities under the bill (disclosure or registration) may be fined up to $8,000.[81] Those who through simulation or fraud, permit the enjoyment by foreigners of rights not authorized by the law, are subject to prison sentences of up to nine years plus fines.[82] Agreements and acts in violation of the law are void and those responsible may be fined up to $8,000.[83]

The immediate administration of the law, until the National Foreign Investment Commission has established procedures and standards, is the responsibility of the Secretary of Foreign Affairs acting on recommendations of a commission composed of the Secretaries of Foreign Affairs, Interior, Finance and Public Credit, Industry and Commerce and Tourism.[84]

Historical Perspective

There is an answer in the above to the question whether the rules are changing. It is that they are not, if we are to judge on the basis of the recent legislation in its historical perspective. Perhaps it would be more nearly correct to say that the changes are no more than an organic continuation of the regulation of foreign investment by Mexican authorities through laws, decrees, regulations and simple administrative policies since the 1917 Constitution.

The principal characteristic of the new Foreign Investment Law is its concentration in a single law, of a series of dispositions previously contained in different laws and administrative decisions. The law does break new ground in creating a general national registry of foreign investment, in creating a single commission to deal with the subject matter, and in establishing the 49 percent guideline for foreign ownership.[85]

[79] *Id.*, Art. 6; Regarding the term "vinculado," Under-Secretary of Industry and Commerce Lic. Campillo Sainz commented that the use of a term without a clearly defined legal meaning was intentional.

[80] *Id.*, Art. 3.

[81] *Id.*, Art. 29.

[82] *Id.*, Art. 31.

[83] *Id.*, Art. 28.

[84] *Id.*, Fourth Transitory Disposition.

[85] Although the form is entirely new in the Foreign Investment Law, the latter two

The registration of license and technology agreements is new, as is the list of standards by which such agreements must now be judged, in order to obtain necessary prior approval. Finally, the new Foreign Investment Law reveals a serious determination to enforce the law as written, and, for many, this will be a novelty.

Many of these new features may be viewed simply as more formal control mechanisms than those which existed in the past, comparable, for instance, to the 1972 legislation affecting operations of foreign banks and financial institutions, the effect of which was to require all such entities and operations to be registered. Now foreign licenses and transfers of technology, and foreign investment, will also be registered.

It has been noted that a great part of the prior regulation of foreign investment by Mexico was based on a law of doubtful constitutionality. To the extent that the new law provides a clear constitutional basis for the regulations affecting foreign investment, it must be considered to have improved upon the previous state of affairs.

On the other hand, one of the problems suggested by Ambassador McBride's query regarding Mexico's treatment of foreign investment and his reference to the rules, and, certainly, one of the principal grievances of the Mexican-American Businessman's Committee to whom he addressed his remarks, was precisely the lack of clearly defined standards. On this score, the new law does little to improve upon the past, since apart from its repetition of existing rules it leaves much to the discretion of those administering it.

As a consequence, a great deal of the Mexican policy on foreign investment will continue to be defined by Government spokesmen and Government administrators in the daily fulfillment of their functions operating in what has been a typically and perhaps uniquely Mexican manner. That has not changed and likely will not.

Latin American Perspective

If the historical perspective provides a means of evaluating Mexico's Foreign Investment Laws in a vertical plane, there is a further kind of evaluation which one may think of as on a horizontal plane, which is equally important in assessing the overall meaning of these laws. That is the relationship to comparable laws in other Latin American Countries.

In spite of the difficulties of evaluating differing laws apart from their legislative and economic settings some meaningful differences can be noted

features are not entirely without precedent. The presidential decree of 1944 authorized the Secretary of Foreign Relations to require 51 percent Mexican ownership (that faculty being discretionary), and an Inter Secretarial Commission on Foreign Investment existed in 1947.

and conclusions drawn, by analyzing the Foreign Investment Laws of Mexico alongside some of their Latin American counterparts.

In General

General Foreign Investment Laws have existed in Brazil and the Argentina since the 1950s. Foreign exchange problems created a kind of foreign investment law in Colombia and Chile during the 1960s, and both are now committed along with Peru, Ecuador, Bolivia and more recently Venezuela, to the Andean Group's Decision 24 adopted December 31, 1970.[86] In this context a general Mexican Foreign Investment Law is not surprising.

A further observation which can be made at the outset is that the presence or absence of a foreign investment law really means very little as an indicator of business opportunity. The divergent results obtained in countries such as Brazil on the one hand and Chile on the other, demonstrate that one can draw no conclusions from the fact that any country chooses to regulate foreign investment. The critical question is how. Since all Latin countries do regulate foreign investment our question then is how do the regulations compare?

Limitations on Foreign Ownership

Perhaps the most obvious criteria for comparison are the outright limitations on foreign ownership. At one level certain sectors are invariably reserved for government ownership. Beginning with the major countries, in Brazil, petroleum exploitation and refining is a State monopoly and stockholders of the company to which the Federal Government has entrusted this monopoly must be Brazilian-born and not married to foreigners, if their stock carries voting rights.[87] In Argentina, apart from the activities specifically reserved to Government operation, such as munitions, railroads, mail and telegraph, certain specific companies controlled by the government have virtually preempted private activity in water and power, electricity for Buenos Aires, gas, international air travel, petroleum and coal. Beyond these, the State is empowered to assume a preponderant role in

[86]In the case of Brazil the general foreign investment law, and the one we will be working with throughout, is law 4131 of September 3, 1962 as amended. In Argentina the general foreign investment statute now in force is law 19151 of July 30, 1971; the earlier Argentine Act was Law 14780 of Dec. 27, 1958. In the Andean Group, Decision 24 of the Commission of the Agreement of Cartagena was approved by the Commission Dec. 31, 1970, and by the member countries before June 30, 1971. It is in various stages of implementation in the different countries. We have not included any comparisons to the specific Chilean laws because the general climate for all business there is so difficult today, that reference to foreign investment laws would not be meaningful.

[87]Law 2004 of 1953.

basic iron and steel, forestry, and mining extraction and processing of copper and uranium.[88]

The Andean Group's Decision 24 authorizes the supra-national Commission to determine sectors which all countries will reserve to the public sector, without prejudice to the right of each member nation to establish its own norms.[89] A preference is indicated for State participation in the petroleum extractive industries.[90] By comparison to the above, the sectors reserved for state ownership in Mexico are very similar, embracing petroleum, basic petrochemicals, nuclear energy, electricity, railroads, telegraph and radio telegraph and some mining.[91]

If we extend the comparison to activities in which foreign ownership is limited or prohibited by law, the Mexican laws are seen to be considerably more restrictive. There, foreign ownership is prohibited in radio and television, urban and interurban transportation, domestic air and maritime transportation, forestry, distribution of natural gas,[92] virtually prohibited in some real estate and strictly regulated in others,[93] and limited to specific percentages and in other ways in the mining, banking and finance, steel, cement, glass, fertilizers, cellulose, aluminum, film, coastal shipping, rubber, basic chemicals and other areas.[94]

In Brazil, foreigners may not own newspapers, or radio or television stations, nor intervene, except as stockholders, in mining or hydroelectric power. There are restrictions on ownership of land by foreigners in rural areas and along the frontiers and coast. Foreigners may not own more than 40 percent of Brazilian shipping companies or 20 percent of Brazilian airlines and, under current policies, foreign ownership is limited to 49 percent in the petro-chemical industry and 30 percent in banks and insurance companies.[95] In Argentina, foreign ownership is prohibited in newspapers and magazines, radio and television, aviation, and limited in insurance (40 percent), automobile supplier industry (49 percent) and in the distribution of foods.[96]

[88]Decree 46 of June 17, 1970; Policies No. 124, 125.

[89]Decision 24; Art. 38.

[90]*Id.*, Art. 40.

[91]Foreign Investment Law note 65, *supra;* various other laws cited in notes 29-33. In fact, the State also operates or has ownership interests in the telephone company, the tobacco industry, automobile assembly, manufacture of railroad cars, sugar mills and numerous other activities.

[92]*Id.*, note 66, *supra.*

[93]*Id.*, note 71, *supra; see also* the discussion of Article 27 of the Constitution at the beginning of this article.

[94]*See* laws and text referenced in notes 37, 38, 39, 41, 67.

[95]Constitutional Article 168 contains the limitations on mining and hydroelectric ownership. The remaining restrictions are dispersed in other laws and regulations.

[96]For the policy considerations and authority, Decree 46 of June 17, 1970, Policy 123; for the Auto Parts Industry, Law 19135 of July 21, 1971. In general, Law 18,061.

The Andean Group's Decision 24 (none of the provisions of which are mandatory for member nations in this area) specifically restricts new foreign ownership or investment in water supply, public sewage, electric power and light, cleaning and sanitary services, telephones, postal service and telecomunications in the public service area[97] as well as in insurance, commercial banking and other financial institutions, internal transportation, publicity, newspapers and communication.[98] Basic mineral exploration and exploitation (including forestry) under Decision 24, can be carried out by foreign companies by concessions granted within ten years and lasting no more than twenty.[99]

The Andean Group's divestiture schedule under which New Foreign Investment is required to reduce its participation to 49 percent within a 15-year period (20 for Bolivia and Ecuador), and existing companies will likely be required for practical reasons to observe the same schedule, appears at first to resemble the overall 49 percent limitation in the New Mexican Foreign Investment Law.

However, although the Mexican law contains no specific exception, high officials of the Mexican Government have stated that existing business operations are exempt from this requirement.[100] To this time, at least, there are no indications that practical pressures will be applied to force general divestiture.[101] Mexico's 49 percent rule is also distinguishable from the Andean Group's, in that it permits the National Foreign Investment Commission to increase or decrease the percentage when, in its judgment, this is desirable for the country's economy.[102]

The real significance of reserved sectors from the standpoint of foreign investment is whether these leave open sufficient opportunity for productive contributions by foreign investment and whether in the process of reserving these sectors the treatment of those foreign enterprises already in them is equitable, and does not discourage continued investment in other sectors, which may subsequently be reserved. In this respect, the best indicator of Mexico's historical success is the presence and continued growth of enormous foreign investments within the Country.

[97]Decision 24; Art. 41. The right of member nations to apply different norms is established in Art. 44, but companies benefitting from such different treatment may not benefit from the internal duty reductions.

[98]Decision 24; Art. 26. Existing companies engaged in the above activities (except insurance) were given three years to sell at least 80 percent of their shares to nationals.

[99]Decision 24; Art. 40.

[100]The rationale stated is that no exception is necessary since to have attempted to include such enterprises, would have been an unconstitutional form of retroactive legislation.

[101]In at least one sector, the automobile parts industry required to be 60 percent Mexican by the October 1972 law, it is known that some pressures are being brought to bear on existing companies to incorporate local shareholders.

[102]Mexican Foreign Investment Law; note 56, *supra*.

Repatriation of Capital and Dividends

Another general criterion for comparing foreign investment laws is the attitude toward repatriation of capital and dividends. A comparison of this aspect of Latin American Foreign Investment Laws brings out a basic difference between the laws of all other countries and that of Mexico. Mexico does not have foreign exchange control nor has it attempted to limit remittances by any direct regulations.

Furthermore, its taxation of remittances is not so high, as in some situations in Brazil for instance, as to amount to a practical restraint. Because of this difference, the Mexican law contains no guarantees, restraints or statements of principle with respect to repatriation of capital or profits.[103] Indeed that is not even one of the general criteria by which an investment proposal is to be judged under the law except for a general reference to the balance of payments.

Beyond that, there is no historical precedent whatsoever for any pressures in this regard during the private negotiations carried on by individual companies prior to their going into business in Mexico. In this, Mexico is unique, and has in a sense a system of direct regulation, as distinct from the system of indirect regulation of other countries, which make use of limitations on remittances imposed by the basic foreign investment law, or by foreign exchange control to create a system of incentives.[104]

The Brazilian law is exemplary, and has been known as the Repatriation-of-Profits Act for years.[105] It establishes, or permits the establishment of conditions under which repatriation of capital and profits will be authorized. Without such guarantees, foreign investment in Brazil would be inconceivable. The "cost" of the guarantee is the condition of entry about which more will be said later, and within this framework the Brazilians have evolved a surprisingly flexible and highly specialized system of incentives.

The Brazilian law has another feature limiting practical remittances. Those in excess of a 12 percent average over a three year period are subject to a supplementary tax of 40 percent; for those beyond 15 percent the rate increases to 50 percent, and in excess of 25 percent the tax is 60

[103]Although a failure to register an investment is sanctioned by a prohibition of any payment of dividends to the foreign shareholder, this is a sanction, rather than a restraint, since registration is mandatory and not discretionary for the registry officials. *Id.*, Art. 27.

[104]This suggests a constitutional question under Mexican Law, and one that could be extremely important to potential foreign investors: whether it would be a violation of the Mexican Constitution for subsequent legislation to restrict repatriation of foreign capital invested, or earnings generated, prior to the effective date of the law.

[105]Law 4151, *supra*, note 86.

percent; all of the above on top of the basic dividend remission tax of 25 percent.[106]

The Andean Group's Decision 24 limits annual profit remittances to 14 percent that limits reflecting the earlier Colombian Foreign Exchange Law of 1967.[107] Argentina has no stated limit on dividend remittances, but, its Foreign Investment Law provides for private negotiations as a prerequisite to investment approval. Since the new Foreign Investment Law, there has been a marked tendency on the part of the Argentine Government to impose conditions during negotiations, requiring reinvestment for a period of years and limiting remittance for a further period.[108]

All of the above laws with foreign exchange implications, guaranty repatriation of registered foreign capital and of profits generated thereby, usually with some fixed or practical limitations. However, such guarantees must be evaluated in the light of practical considerations. The situation created by the General Industrial Law in Peru in 1970, followed by the Andean Group restrictions, lead many companies to attempt to liquidate all or part of their investments relying upon the repatriation guarantees contained in the laws.[109] In many instances applications for foreign exchange are still pending.

Approval Mechanisms and Standards

A third area in which foreign investment laws may be compared is the degree of difficulty in obtaining approval of the proposed investment. It is too early to know the extent to which Mexico's new Foreign Investment Commission will make investment by foreigners more difficult. One thing is made abundantly clear, however, by the new Foreign Investment Law: that the use of "straw men" and shadow corporations, to avoid the requirements of the law will no longer be tolerated.

The administrative procedures for approvals of foreign investments in other Latin American Countries are, in general, cumbersome and highly bureaucratic. Brazil's were a horrible example for years and only the country's extremely attractive growth rate and promising future, coupled with the gradual development of competent professional staffs in particular

[106]*Id.*, Art. 43.

[107]Decision 24, *supra*, note 86; Art. 37. The Colombian Law was Decree Law 444 of March 22, 1967.

[108]Law 19151, *supra*, note 86; Art. 8. The Regulations contained in Decree 2400 of April 27, 1972 are also relevant on this point; Arts. 3 and 4. One specific case of negotiated restriction on remittances is the Scania Vabis truck manufacturing concession Decree 6564 of Sept. 26, 1972.

[109]In Peru the General Law of Industries, Decree Law 18350 of July 27, 1970, inaugurated a strict régime of government control of all industry that has as much to do with foreign investment there as the laws directed specifically to foreigners.

areas, made it possible for foreign investors to arrive on the scene in Brazil. Argentina's review mechanisms and compliance procedures are equally cumbersome. On paper those of the Andean Group could be even worse, particularly if the Peruvian regulation is an indication of what one may expect in this area.

Apart from the administrative review there is the question of conditions or commitments on a foreign investment. The Mexican Law has fixed no specific requirements. However, the general criteria stated in the law coupled with the recent policies of the Mexican Government, indicate that a high price may be exacted for foreign investment, particularly beyond the 49 percent level. That price may take the form of required foreign investment, required levels of local content, geographic location or, almost inevitably, required levels of exports. In this area it seems unlikely that the Mexican law will prove to be significantly different in application from those of its major competitors in Brazil and Argentina.

In the late 1950s, under the stimulus of Brazil's incentive system, its automobile industry leapt to virtually 100 percent local content in a period of several years, something never accomplished elsewhere prior to that time. Argentina followed suit in the early sixties. These kinds of developments have produced an overall industrial economic planning potential that is being widely used now in all countries. The most significant push in recent years has been toward exports from the three major Latin American countries.

Of almost spectacular proportions is the 1972 Brazilian legislation applicable to companies producing manufactured goods with special export programs, relaxing the heretofore rigid ban on imported components in exchange for massive exports.[110] Those in the automotive industry are to average $40,000,000 annually for qualifying companies.[111] This is the sort of thing one must expect as a condition for approval of investments in these countries, and Mexico has already indicated through its administration of prior laws it will be following a similar path.

Andean countries are also pushing in this direction, though, for the moment, the single most important element in any investment decision in these areas will surely remain the question of gradual divestiture.

Operating Difficulties for Foreign Enterprises

Hidden among the more obvious regulations on foreign investment, are normally a series of subsidiary provisions which can have the effect of

[110]Decree Law 1219 of May 15, 1972.

[111]Council for Industrial Development, Resolution 20/72 of August 15, 1972.

making the operations of the foreign-owned company more difficult or, even impossible: approval of new activities, access to local credit, limitations on employment of foreign administrative and technical personnel, limited access to tax incentives and the like.

Mexico's new Foreign Investment Law contains no direct restrictions of this nature. There is a reference to access to foreign sources of credit among the general criteria to be considered, and, all other things being equal, an enterprise's ability to obtain foreign credit independently will be an asset. The powers of the Commission include the power to regulate the entry of existing foreign-owned enterprises into new areas or activities and the opening of new branches or locations. Government officials have stated that these grants of power do not imply a requirement of prior approval, but that as a matter of policy, where there is a possibility of exploitation by Mexicans, the Commission may be expected to use this regulatory power.

Other Latin countries have had a greater tendency in recent years to create such specific operating difficulties for foreign companies. Argentina's Foreign Investment Law limits short term borrowings by companies more than 50 percent owned to 50 percent of the registered capital plus reserves. The law also requires an average of 85 percent Argentine personnel in management and technical and professional areas, limiting exceptions with permission to three years. Mexican Law requires 90 percent Mexican personnel.

Although the law excepts administrative and technical personnel, the policy has been to include them. In the Andean Group's Decision 24, all foreign borrowings must be approved, and foreign companies will have access to internal credit only on an exceptional basis and then only for short term purposes. In Brazil, Government banks may not lend money to new foreign ventures or guarantee their borrowings.

Mention must also be made of other regulatory powers such as price control, import permits and the like. In recent years, along with the taxing power, these have been employed to discourage and, in some cases, destroy foreign business in Latin America. They are more dangerous than all of the other forms of regulation because they cannot be provided for, and can leave the aggrieved company without legal redress.

In Mexico, the authors know of no instance in which foreign enterprises have been pressured into a complete forfeiture of a business venture by these means. On the other hand, it is widely felt that where companies seeking import permits, tax exemptions or the like, required in their business operations do not voluntarily comply with Government policies, the permits or other concessions will be withheld. The point is relevant with particular reference to foreign companies, because there have been cases in

which these pressures have been used to induce "Mexicanization" even when not required by law.

Technology Licensing and Remittances

Finally in the area of technology and licensing, Mexico with its law of December 30th, 1972, becomes the last major Latin American country to regulate directly the licensing of Industrial Property and Technology by foreigners.[112] In so doing it has closely followed the example set by other Latin American countries, taking the original draft of its law from that of Argentina passed during 1971.[113] Prior to this law, Mexico's regulation of this area was limited to taxation of payments, its most recent change in this respect being the increase effective January 1st, 1971 of the rate applicable to remissions for Technical Assistance to 42 percent, thus equating these to payments for royalties.

The public statements issued at the time of that law indicated a desire to avoid direct regulation.[114] The obvious change in policy since that time has produced a law which, after discounting the anti-foreign publicity that attended its passage, does not significantly limit the ability of foreign companies, whether related or not, to effect meaningful transfers of industrial property rights and technology, to Mexican companies in consideration for reasonable payments. The law does not discriminate against payments to related parties, as does the Andean Group's absolute restriction on payments to such parties, or Brazil confiscatory taxes applied to such remittances.[115]

It does not establish any absolute ceiling, as has been done in some cases in Argentina, nor gone to the extreme of the Argentine Law prohibiting trademark licenses from foreigners.[116] The list of prohibited clauses closely parallels those in the Argentine Law, and in Decision 24.

Overall Comparison

Over all, then, Mexican laws on Foreign Investment and Technology

[112]Venezuela is still without a technology law but its announced entry into the Andean Group will bring Decision 24 into effect there. For a comparative analysis of Latin American Laws in this area see Frank M. Lacey; *Technology and Industrial Property Licensing in Latin America: A Legislative Revolution*, THE INTERNATIONAL LAWYER, Vol 6, No. 2, April 1972.

[113]Law 19231 of September 10, 1971.

[114]*See* the comments in *Investigación Fiscal;* No. 65, May 1971 at p. 27.

[115]Decision 24, *supra*, note 86; Art. 21; in Brazil no payments may be made for patent and trademark royalties to related parties and technology payments are not deductible and subject to a remittance tax of 25 percent.

[116]The Argentine Technology Law 19231 of Sept. 10, 1971 prohibits all payments for Trademark Royalties (Art. 3), and authorized the determination of fixed limits for all others. A limit of 2 percent to be paid out of net profits has been set for the Automotive Industry; Law 19135 of July 21, 1971; Art. 30.

might be considered more restrictive in the activities reserved to the State and to national private ownership, comparable in approval standards, slightly more favorable to this time on technology transfers, and in the absence of legislative operating difficulties for foreign companies, and far superior on repatriation of profits. Perhaps most importantly, considering the history of Mexico's regulation of foreign investment, there is good reason to believe the administration of these laws will probably be more flexible than that of any of the other Latin American countries.[117]

Evaluation

Lic. Sierra de la Garza

This article should indicate certainly that the theme of control of foreign investment in Mexico is not new but that on the contrary Mexican authorities through laws, decrees, regulations and simple administrative policies have been concerned with these questions for many years, and have attempted to establish norms in this respect.

The cited Law to Promote Mexican Investment and to Regulate Foreign Investment which will shortly be in effect does not, in the author's opinion, change substantially the existing situation, and in fact might be said to confirm the same. Although the Law requires, as a general rule, a majority of Mexican capital in Mexican companies formed after its effective date, as will be seen from the above discussion, in an ever increasing number of industrial activities, this majority has already been required.

Moreover, the new Law provides the authorities in charge of its application with broad discretionary powers. This undoubtedly will result that in certain cases the 51–49 percent proportion will not be observed strictly by allowing the authorities to establish different capital proportions, or, if the case merits, permit a 100 percent foreign investment. Such criteria were confirmed in declarations made in Europe during March by Lic. Campillo Sainz, Under-Secretary of the Ministry of Industry and Commerce, who stated before a group of important French financiers and industrialists, that the Mexican Government intends to apply the new Law with great flexibility, and that in special cases association of foreign capital will not be required in a minority position with Mexican capital.

We shall of course have to await the practice in order to know the manner and terms under which the new Law shall be interpreted and applied, but all indications are that it is not a design to establish chauvinis-

[117]One indication of this is the trouble to which the government has gone to explain the new law to foreign nations and investors. Government officials have visited Europe and the United States for this specific purpose.

tic or discriminatory policies, but one to fix a single norm to define the conditions under which foreign investment must operate in Mexico.

Mr. Lacey

Much of the fascination with the Rules-of-the-Game image and debate, and the bitterness of some Mexican reaction to it, can be attributed to its inference that business and economic processes are something of a game. They are of course, a great deal more than that, and no thinking businessman or lawyer, American or Mexican, approaches them in this light or will be misled by the allusion. But putting that aspect aside, deeper questions emerge from a consideration of this subject, which are a result of its focus upon the process of change.

The American free-enterprise system, and its legal system, are based upon a concept of predictable, measurable change. A large part of the world is undergoing change that is neither predictable nor measurable. Mexico is one of the countries living in both worlds. Her modern history has been one of successful accommodation to both.

It is this lawyer's view that the new laws continue and do not change that historical accommodation. But one must never forget the other world, in which the process of change, whether that be social or legal, cannot be subjected to the principles of our more settled system. Mexico will continue to be a part of that world, and it is probable that influence will increase rather than decrease in the coming years.